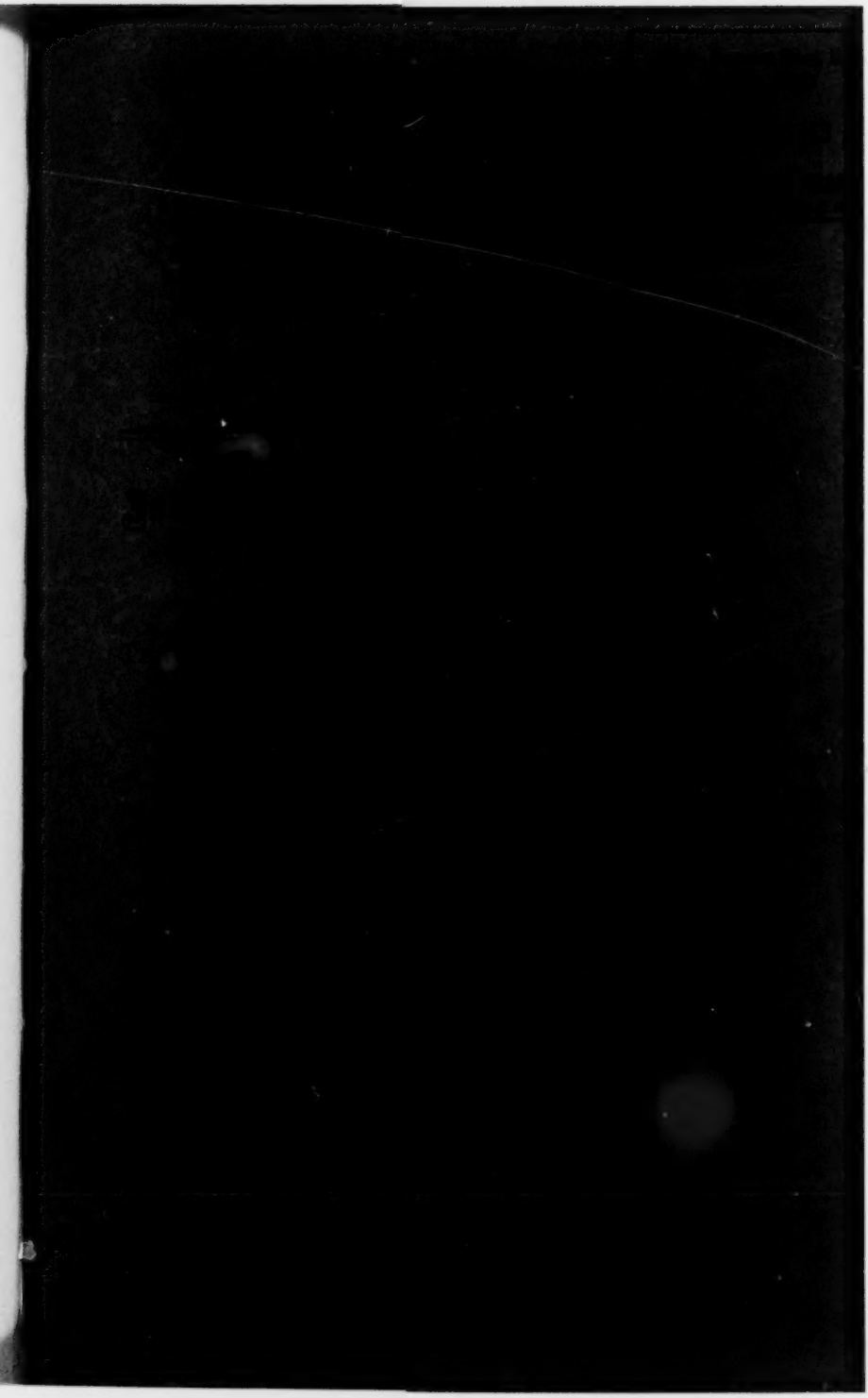

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 788

THE STANDARD OIL COMPANY OF KANSAS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 93–104), together with the concurring opinion of Judge Jones (R. 104–105) and the dissenting opinion of Chief Justice Whaley (R. 105–109), are reported in 47 F. Supp. 120.

JURISDICTION

The judgment of the Court of Claims was entered October 5, 1942 (R. 109). On November 3, 1942, the taxpayer filed a motion for a new trial which was overruled on December 7, 1942 (R. 109–110). On January 5, 1943, taxpayer filed an objection and plea to the jurisdiction of the court

(R. 110–135), which was overruled on January 6, 1943 (R. 136). The petition for writ of certiorari was filed March 4, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether the Court of Claims, upon finding that officials of the taxpayer had submitted fraudulent evidence to representatives of the Bureau of Internal Revenue in support of a claim for refund of taxes, erred in holding that the claim was forfeited to the Government under Section 172 of the Judicial Code.

STATUTE INVOLVED

Judicial Code:

> SEC. 172. Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States shall, ipso facto, forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same.
> (U. S. C., Title 28, Sec. 279.)

STATEMENT

The facts found by the Court of Claims (R. 61–93) may be summarized as follows:

The taxpayer, a Delaware corporation, is the successor of a Kansas corporation of the same name. The Kansas corporation had been for many years prior to 1929 engaged in the refining of petroleum. In its refining plant this company had a number of stills known as Burton stills, which at the time of their installation were generally recognized as well adapted for the purpose for which they were installed. These Burton stills were not, however, adapted to the production of "anti-knock" gasoline, which came on the market shortly before the year 1929 and for the production of which improved types of equipment had been evolved. (R. 61.)

Prior to and during the year 1929 the officers and directors of the Kansas Company had been making investigations to determine whether the Burton stills should be continued in operation, and it was recognized before the year 1929, as well as during that year, that these stills were becoming obsolete because of the demand for higher octane gasoline and lower manufacturing costs which were possible with other types of equipment (R. 61–62).

During the years 1929 and 1930 the officers and directors of the Kansas Company had considered among themselves the question whether the Burton stills Nos. 5, 6, 7, 11, and 12 (the ones involved

in this suit) were obsolete, but neither during these years, nor prior thereto, had any action been taken by the board authorizing their abandonment or elimination from the company's assets. No reference was made in the minutes of the directors' meetings for those years of any discussions with respect to the obsolescence or abandonment of these assets, and the stills remained on the books of the company and were included in its balance sheet until at least 1932. (R. 62–63.)

The directors of the Kansas Company during this time were A. S. Hopkins, E. A. Warren, A. L. Morrison, E. A. Metcalf and Earle W. Evans. In March 1930, C. B. Wrightsman, who had been acquiring stock in the company, was elected a director in place of Morrison. After becoming a director Wrightsman indicated his disagreement with the manner in which the business was being carried on. (R. 64–65.)

In March, 1932, Wrightsman gained control of the corporation and had himself elected president, with Hopkins and Warren as vice presidents. The former secretary-treasurer, A. L. Morrison, was replaced by H. G. Lea, a former federal revenue agent who had been employed for several years by C. J. Wrightsman (Wrightsman's father) (R. 65). From the time of his election as secretary-treasurer in March 1932 until March 8, 1935, Lea had the custody of the books and records of the Kansas Company and of taxpayer (R. 65).

Soon after Wrightsman gained control of the Kansas Company he employed Arthur Young and Company, a firm of certified public accountants, to make a detailed audit of the company's books and records in order to determine its financial condition as of March 31, 1932. During the course of the examination the accountant for the accounting firm and Lea advised Wrightsman that the accountant, in going over the accounts, had ascertained that insufficient charge-offs had been made in prior years on account of obsolete equipment. Lea stated that on the basis of this information the company appeared to be entitled to a refund of income taxes paid in prior years. He mentioned his previous experience as a revenue agent as qualifying him to handle the claim for refund without the assistance of outside counsel, and Wrightsman authorized him to proceed with the preparation of the claim and its prosecution. (R. 66.)

In this connection amended returns were filed for the years 1929 and 1930, and the accountant had adjusting entries prepared to write down the plant value on account of depreciation and obsolescence. These entries provided for the entire elimination of batteries 5, 6, 7, 11, and 12, with the explanation that they had been abandoned in the year ended December 31, 1929. (R. 66.)

The accountant, in addition to examining the accounting records, examined the company's minute books for 1929 and 1930 but failed to find any

authorization for the abandonment or charge-off of these batteries (R. 66).

The refund claims were considered by various representatives of the Bureau of Internal Revenue and conferences were had with Lea and also with Wrightsman. In September 1934, at a conference at the office of the Assistant General Counsel, Wrightsman was advised that the evidence was insufficient to establish obsolescence or that the batteries of these stills had been abandoned. In particular it was pointed out that contemporaneous evidence in the form of corporate minutes was lacking showing authorization for the abandonment of the stills in 1929. (R. 66–68.)

After the conference Wrightsman communicated with Lea by long-distance telephone and asked him if the minute books showed authorization for the charge-off of these batteries. Lea told him that so far as he knew they did not. At the request of Wrightsman, the Assistant General Counsel wrote a letter outlining the deficiencies in the record to substantiate the claim, and emphasizing the importance of factors, such as board resolutions and information from corporate minutes, which would manifest an intention to abandon the stills in 1929. The letter was turned over to Lea to secure the necessary information for an appropriate reply. Lea interviewed certain former officials of the company and examined documents and records in the taxpayer's possession. Lea fur-

nished the information obtained to George E. B. Peddy, taxpayer's general counsel. Peddy on the basis of this information prepared a letter in reply. (R. 68–70.)

The letter, dated October 16, 1934, stated, among other things, that "The company's minute book shows that this matter [of abandonment] was under discussion by the officers and directors of this Company on numerous occasions in 1929, during which year it was determined to charge off this obsolete equipment." Lea forwarded the letter to Wrightsman in New York, who signed it and then came to Washington and delivered it to the Assistant General Counsel in person. (R. 70–71.) Attached to the letter was a sworn statement by Lea stating that the minute books of the company showed the following resolution was adopted by a meeting of the board of directors held on January 7, 1930 (R. 71):

> Resolved, That owing to the perfection of new refining equipment and the present economic conditions, the Treasurer and Superintendent be directed to make a plant survey of all obsolete equipment including Burton stills, receiving houses, and other items with a view of charging the same off of the records of the Company and deducting the same for both ad valorem and income tax purposes.

Lea also obtained affidavits from Hopkins and Warren, signed by each of them on November 2,

1934, in which each stated that this minute had been adopted at a meeting held early in January, 1930. Further affidavits were prepared by Metcalf and Evans, both stating that the officers and directors had concluded in 1929 that the stills should be abandoned, but neither was prepared to state that this minute had been adopted. Metcalf questioned that it had; Evans had no independent recollection of it, but stated that he had no reason to doubt its authenticity and had reason to believe it authentic because it was in accordance with his understanding of the situation. All of these affidavits were submitted to the representatives of the Bureau in support of the taxpayer's claim. (R. 72–77.)

At a further conference between Lea, C. J. Wrightsman, and representatives of the Bureau in December 1934, the latter indicated that the evidence was insufficient to substantiate the claim for obsolescence, and pointed out that the resolution of January 7, 1930, was directory only and authorized a future survey which could not possibly apply to 1929 transactions. Lea was asked if he had the minutes referred to in Wrightsman's letter of October 16, 1934, and he replied that he had searched the records and minute books and had found nothing. After the conference Lea asked a Bureau attorney how the taxpayer's case could be proved, and he was told that unless contemporaneous evidence was produced to establish the

abandonment of the stills in 1929 or intention to abandon them at that time the claim would be denied. (R. 77–78.)

Following this conference, attorneys were employed to handle the taxpayer's claim. At a subsequent conference between Lea, J. G. Korner (one of the new attorneys), and representatives of the Bureau, the latter pointed out the inadequacy of the evidence on file to support the claim of a deduction for obsolescence particularly with reference either to abandonment in 1929 or intent to abandon the property at that time. The taxpayer's representatives agreed to make a search of the records and minute books with the view of determining whether any contemporaneous evidence existed of the character mentioned by the Bureau representatives. After the conference Korner inquired of Lea how the resolution of January 7, 1930, had been discovered and he replied that he did not know other than that some clerk in the office had found it and that he had never searched the minute book. Korner told Lea that a search should be made and in the event any other pertinent minutes existed the Bureau representatives were entitled to see them. (R. 78–79.)

Taxpayer's counsel proceeded with the securing of additional evidence in support of the claim for refund, and in that work they were actively assisted by Lea. During December of that year a representative of Arthur Young and Company was engaged in the annual audit of taxpayer's books, and

he was requested by Lea to examine the minute books for prior years to see whether a minute could be found which made any reference to the subject matter of the claim for refund for 1929, with particular reference to the abandonment or obsolescence of the batteries here involved. Shortly thereafter this accountant called Lea's attention to a resolution of May 22, 1929, reading as follows (R. 79):

> Resolved, That Estimate No. 492 be granted under date of May 22, 1929, in the amount of $33,027.61 to cover the cost of converting No. 10 Battery Tube Stills to Continuous Stills, and that Nos. 5, 6, 7, 11, & 12 Batteries be discarded and abandoned as obsolete.

Later that accountant and the accountant who had made the examination in 1932 compared their notes and found that while the notes of the latter made reference to the first part of the resolution, no reference was made to the last part, reading, "and that Nos. 5, 6, 7, 11, & 12 Batteries be discarded and abandoned as obsolete." This discrepancy was not called to the attention of taxpayer's officers by the accountant. (R. 79.)

After the discovery of this minute the taxpayer's attorneys and Lea had interviews with Hopkins and Warren with respect to the execution of revised affidavits. They declined to sign revised affidavits, which included reference to the minute of May 22, 1929, questioned its authenticity as

well as the authenticity of the resolution of January 7, 1930, and in addition at times declined to cooperate with taxpayer's representatives in presenting additional evidence in support of the refund claim. (R. 80.)

In February 1935 one of the counsel for the taxpayer submitted additional evidence in support of its claim for refund. Among the supporting exhibits was a sworn statement by Lea that the corporation's minute book showed the unanimous adoption by the directors of this minute of May 22, 1929. (R. 84.)

At a subsequent conference at the Bureau in March 1935 Lea had with him the original minute book. During the discussion, one of the Government conferees called attention to a difference in typing between the first and second pages of the minutes of May 22, 1929. Further examination revealed that these two pages were on different kinds of paper. (R. 85–86.)

As a result of this disclosure taxpayer's attorneys and Wrightsman investigated the entire matter. Investigation was also made by an agent of the Special Intelligence Unit of the Treasury Department, who reported that he was unable to fix responsibility for the alteration of the minutes. It had been discovered by this time that the statement "and that Nos. 5, 6, 7, 11, & 12 Batteries be discarded and abandoned as obsolete" had never been adopted originally as part of the minute but had been added at some later date. (R. 86–89.)

The taxpayer's claims for refund were rejected by the Commissioner on November 15, 1935. Thereafter application was made for reopening and reconsideration of the claims, but no allowance of them was ever made. (R. 91–92.)

The last part of the resolution of May 22, 1929, reading "and that Nos. 5, 6, 7, 11, & 12 Batteries be discarded and abandoned as obsolete" and likewise the entire resolution of January 7, 1930, were never adopted by the board of directors but were thereafter added to those minutes for the purpose of assisting the taxpayer in the proof of its claim then pending in the Bureau of Internal Revenue for a refund of taxes. Lea, the taxpayer's secretary-treasurer and agent in the presentation of the claim, knew when he presented the minutes to the Bureau that they were false. (R. 92–93.)

After this suit was filed in the Court of Claims on June 30, 1937 (R. 1), the United States filed a special answer and plea of fraud on December 13, 1939 (R. 40–41). The case was heard on the Government's special plea and the taxpayer's reply.

The court below, upon its special findings, decided as a conclusion of law "that plaintiff, The Standard Oil Company of Kansas, corruptly attempted to practice and practiced fraud against the United States in the proof or establishment of its claim against the United States" (R. 93). Accordingly, the court sustained the Government's plea and held that the taxpayer's claim was forfeited.

ARGUMENT

1. The petition for certiorari is based principally on the contention that Section 172 of the Judicial Code (28 U. S. C., Sec. 279), *supra,* requires forfeiture of a claim against the Government only where fraud is committed in the presence of the court (Pet. 19); consequently, it is argued, the court acted beyond its jurisdiction in sustaining the plea of fraud where the fraud was perpetrated in the course of efforts to establish the refund claim before the Bureau of Internal Revenue.

The statute, however, refers to fraud in the "proof, statement, establishment, or allowance of any claim * * * against the United States." Its meaning is clear on its face. There would be no justification for reading into the enactment the restriction which the taxpayer proposes. In its recent decision in *Jerman* v. *United States,* 96 C. Cls. 540, where fraudulent invoices had been submitted to accounting officers, the Court of Claims aptly observed (pp. 552–553):

> We do not think that Congress would have had any reason for distinguishing between, or showed any intention to distinguish between, the presentation of a false invoice to a purchasing agent of the government having authority to issue a voucher for its payment, and a similar presentation to the Comptroller General or to the court. In any case its purpose is to fraudulently obtain money from the United States. The

statute seems to us to mean that such an attempt results in the forfeiture of whatever right might have otherwise resulted from the transaction. See *Furay* v. *United States,* 34 C. Cls. 171; *New York Market Gardeners' Association* v. *United States,* 43 C. Cls. 114.

Certainly, the fact that the Government might have taken penal action against the parties involved, or enforced other civil remedies (Sections 3490, 3491, and 5438 of the Revised Statutes, 31 U. S. C., Secs. 231–232; see R. 114–120; Pet. 16–18), does not compel the conclusion that Congress intended differently. It is significant in this connection that with respect to frauds committed in its presence, the court already had the power to punish for contempt.[1] Nor can a valid argument be constructed in support of the taxpayer's position (R. 120–122) by drawing inferences from the circumstance that Congress some years later used different language to accomplish essentially the same results with respect to fraud in establishing the particular types of claims referred to in the Act of June 16, 1874, c. 285, 18 Stat. 66, 75, Sec. 2 (Section 173 of the Judicial Code, 28 U. S. C., Sec. 280).

The decision is in accord with the position taken by the Court of Claims in *Furay* v. *United States,*

[1] See Section 157 of the Judicial Code (28 U. S. C., Sec. 263), first included in the Act of February 24, 1855, c. 122, 10 Stat. 612, Sec. 3. Section 172 was adopted in the Act of March 3, 1863, c. 92, 12 Stat. 765, Sec. 11.

34 C. Cls. 171; *N. Y. Market Gardeners' Assn.* v. *United States,* 43 C. Cls. 114, 136; and *Jerman* v. *United States, supra.* Efforts to distinguish between fraud affecting the claim itself and fraudulent proof offered to establish a claim represent an over-subtle refinement. In the *Furay* case, the assertion of part of a claim was based on fraud, but the balance was admittedly valid; nevertheless the entire claim was forfeited. Here the fraudulent evidence related to the claim in its entirety. The basic considerations of policy, upon which the statute rests, are the same in both instances.[2]

2. The taxpayer also complains (Pet. 22–28) that the decision "convicts" Lea of forgery on the basis of a preponderance of the evidence. Presumably, the argument is that the court could not make the findings of fraud required by Section 172 unless the Government proved its case beyond a reasonable doubt, or at least by its substantial equivalent. Compare the views expressed by the two dissenting judges (R. 108). It is evident, however, that Section 172 is in the nature of a civil remedy, in which a preponderance of the evidence is sufficient. See *Helvering* v. *Mitchell,* 303 U. S. 391, 399–400, and cases cited therein; cf. *United States ex rel. Marcus* v. *Hess,* decided by this Court January 18, 1943, No. 173, this Term. And

[2] It should be noted that a bill was proposed in Congress in 1940 to modify the strict requirements of Section 172, but the bill died in committee. H. R. 8956, 76th Cong., 3d Sess.

the opinion of the court and the concurring opinion make it clear that all three majority judges not only regarded the proof as wholly clear and convincing but also that it admitted of no other reasonable conclusion. As the concurring opinion states (R. 105):

> The circumstances of this case are so strong as to preclude any other reasonable conclusion than that there was attempted fraud and that some of the officials of the company knew, or had reason to know, that the resolutions were not authentic. * * *

CONCLUSION

The decision is correct and it does not involve any conflict. There is no occasion for review by this Court.

Respectfully submitted.

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